United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1207

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1207

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARCE BELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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JOHN D. GORDAN, III,
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Preliminary Statement

Marce Bell appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on May 19, 1975 after a one-day bench trial before the Honorable Dudley B. Bonsal, United States District Judge.

Indictment 74 Cr. 1073, filed November 14, 1974, charged Bell in one count with receiving, possessing and transporting in commerce or affecting commerce a firearm after having been convicted of a felony in violation of Title 18, United States Code Appendix § 1202(a).

Trial commenced against Bell on March 25, 1975 and concluded that same day, when he was found guilty as charged in the indictment. On May 19, 1975, Judge Bonsal sentenced Bell to a term of two years imprisonment.

Bell remains free on bail pending appeal.

Statement of Facts

The Government's Case

On October 7, 1974, members of the New York Drug Enforcement Task Force obtained a warrant to search Apartment 253 of 1700 Harrison Avenue, Bronx, New York, the apartment in which Bell lived * (Tr. 9-10).** The Task Force agents then proceeded to 1700 Harrison Avenue, where they established surveillance at approximately 7:00 P.M. (Tr. 11).***

At approximately 8:00 P.M. Bell and a woman left 1700 Harrison Avenue and approached Bell's car, parked opposite the apartment building. The car bore New Jersey license plates. When Bell reached the car, he walked around it, noticed that his left rear tire was flat, and opened the trunk (Tr. 12, 27, 58-59).

While Bell was reaching into his trunk, the agents decided to approach him and announce their purpose. The first agent to reach him was Nolan Pazin, a New York

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* The affidavit in support of the warrant, sworn to by Police Officer William Frawley, stated in pertinent part:

> ". . . [O]n October 7, 1974 a fellow officer advised your deponent that he received a telephone call from a reliable confidential informant who advised my fellow officer that he (the informant) had observed approximately 10 ounces of heroin and a measuring spoon in Apartment 253 at 1700 Harrison Avenue. Bronx. New York within the past four days. The informant further advised my fellow officer that the occupant of Apartment 253 is Morris Bell. The informant also stated that he saw Bell carrying a .38 caliber revolver and a machette [sic] within the past four days."

** "Tr." refers to the trial transcript; "Br." refers to appellant's brief; "A" refers to appellant's appendix.

*** One of the agents, William Frawley, testified that they did not execute the warrant immediately because of their concern that Bell might destroy the narcotics that were the object of the search (Tr. 25).

State policeman; he was followed closely first by William Frawley and then by other Task Force agents (Tr. 13-14, 60).

Pazin reached Bell as he was standing in the trunk of the car and bending over in an attempt to remove his spare tire. Bell turned to face Pazin, who noticed a bulge at Bell's waistband. Pazin, immediately realizing the bulge to be a gun, reached over and removed it from under Bell's jacket.* Bell was immediately placed under arrest and advised of his constitutional rights (Tr. 14-16, 60).**

The agents then took Bell back to his apartment, where the search warrant was executed. In the apartment, Bell told the agents that he had purchased the gun in Virginia several years before (Tr. 18-19).

On October 8, 1974, Bell was taken to the United States Courthouse for arraignment before a magistrate. Prior to arraignment he was interviewed by T. Barry Kingham, an Assistant United States Attorney. After being advised of his constitutional rights, Bell acknowledged that he had a loaded gun on his person at the time of his arrest. He also reiterated that he had bought the gun in Virginia (Tr. 19-20, 91-96).

The gun removed from Bell was a .38 caliber revolver, loaded with five rounds of ammunition (Tr. 15). It bore the markings "I.N.A. Made in Brazil." John O'Leary, an agent of the Bureau of Alcohol, Tobacco and Firearms also

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* As of October 7, 1974 Pazin was aware that Bell was known to carry a gun (Tr. 67) and that he had previously been convicted of manslaughter (Tr. 82).

** Prior to trial, Bell moved to suppress the gun. The suppression hearing was consolidated with the trial on the merits, and at the close of evidence Judge Bonsal ruled that the gun had been properly seized (Tr. 111-112). That ruling is not challenged on appeal.

testified that I.N.A., an abbreviation for "Industrial National Arms," was a Brazilian corporation. The corporation is now defunct and its records destroyed (Tr. 82-91).

In 1967 Bell was convicted of manslaughter in the Supreme Court, New York County, and sentenced to imprisonment for a term of five to seven years (Tr. 19-20; GX 3).

The Defense Case

Bell offered no evidence.

ARGUMENT

The Government's proof was sufficient to establish a violation of 18 U.S.C. App. § 1202(a).

The only issue raised on this appeal is whether Bell's possession of a gun which had previously traveled in interstate commerce constituted a violation of 18 U.S.C. App. § 1202(a). There is no dispute that Bell is a convicted felon; he pleaded guilty to manslaughter in the Supreme Court, New York County, in 1967 and received a five-to-seven year sentence (GX 3). Nor is there any real dispute that the gun he possessed, a .38 caliber revolver bearing serial number 013196, traveled in interstate commerce. Bell twice confessed, once to Task Force agents and once to an Assistant United States Attorney, that he had purchased the gun in Virginia (Tr. 18, 96). Moreover, the gun itself is stamped "Made in Brazil", bears the notation "Brazil" on the screws, and bears the trade mark "I.N.A." which was a Brazilian corporation (GX 2; Tr. 82-86).*

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* Bell argues (Br. 18) that the testimony of A.T.F. Agent John O'Leary regarding the gun's markings was hearsay. He overlooks the fact that the gun (and all of its markings) had already been received in evidence without defense objection (Tr. 16). Moreover, the gun, as Judge Bonsal found (Tr. 115), bore several Portuguese abbrevations, from which one could also infer foreign origin.

[Footnote continued on following page]

Although Bell argues in his brief (Br. 7) that he was convicted of each of the three offenses charged in the alternative under Section 1202(a), to wit, possession, receipt and transportation, it is clear that he was convicted only of possession. After the court announced its findings and conclusions, defense counsel inquired whether Bell had been convicted on one aspect of the statute or all three (Tr. 116). After a brief colloquy, Judge Bonsal stated, "If you listened to me I find him guilty of possession" (Tr. 118).*

The facts adduced at the trial establish the offense of possession. The Government submits that § 1202(a) is violated if a convicted felon possesses a gun at any point after it has traveled in interstate commerce. That interpretation accords both with the intent of the Congressional proponents of the statute and with the construction of all but one of the other Circuits that have passed on the question.

Bell also contends that O'Leary's testimony concerning documentation he had received concerning the gun's origin was inadmissible hearsay. Even if this were so, Bell concedes (Br. 19) that Judge Bonsal did not rely on that testimony in reaching his decision (Tr. 113-116). Moreover, it is well settled that in a bench trial, it is presumed that the trial judge relied only on properly admitted and relevant evidence; the introduction of incompetent evidence does not require reversal in the absence of some showing of prejudice. *United States* v. *Reeves*, 348 F.2d 469 (2d Cir. 1965), *cert. denied*, 383 U.S. 929 (1966); *United States* v. *Schechter*, 475 F.2d 1099 (5th Cir.), *cert. denied*, 414 U.S. 825 (1973); *United States* v. *McCarthy*, 470 F.2d 222 (6th Cir. 1972); *United States* v. *Greathouse*, 484 F.2d 805 (7th Cir. 1973).

* Because Bell's conviction below was solely for possession, we do not address ourselves to his arguments that the proof was inadequate to make out "transportation" or "receipt" as charged in the alternative with "possession" in the indictment. In our view, the sufficiency of the proof of interstate nexus here turns solely as the "possession" aspect of the indictment.

A. Prior case law establishes that possession of a weapon by a felon after it traveled in interstate commerce violates the statute.

Seven Circuits as well as several district courts have thus far passed on the question of whether simple possession of a weapon after it has traveled in interstate commerce establishes a violation of the statute. All but one have concluded that it does. See *United States* v. *Kenner*, 508 F.2d 409 (4th Cir. 1974); *United States* v. *Mullins*, 476 F.2d 664 (4th Cir.), *cert. denied*, 414 U.S. 839 (1973); *United States* v. *Ransom*, 515 F.2d 885, 891 (5th Cir. 1975); *United States* v. *Fields*, 500 F.2d 69 (6th Cir.), *cert. denied*, 419 U.S. 1071 (1974); *United States* v. *Bush*, 500 F.2d 19 (6th Cir. 1974); *United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973); *United States* v. *Brown*, 472 F.2d 1181 (6th Cir. 1973); *United States* v. *Horton*, 503 F.2d 810 (7th Cir. 1974); *United States* v. *Powell*, 513 F.2d 1249 (8th Cir. 1975); *United States* v. *Bumphus*, 508 F.2d 1405 (10th Cir. 1975); *United States* v. *Henry*, 504 F.2d 1335 (10th Cir. 1974); *United States* v. *Williams*, 370 F. Supp. 837 (N.D. Ind. 1974); *United States* v. *Jones*, 366 F. Supp. 237 (W.D. Pa. 1973); *United States* v. *Snell*, 353 F. Supp. 280 (D. Md. 1973); *United States* v. *Oclit*, 343 F. Supp. 447 (D. Hawaii 1972). *Contra*, *United States* v. *Cassity*, 509 F.2d 682 (9th Cir. 1974).

Many of the aforementioned cases present fact patterns indistinguishable from the case at bar; in *Bumphus*, *Horton*, and *Jones*, for example, a gun found pursuant to a search warrant formed the basis for a § 1202(a) indictment. To take one example yet further, in *Bumphus* several guns were found in defendant's Kansas home in the course of the execution of a search warrant. One gun, it was found, had been stolen from its owner in Texas a year earlier. Another gun had been manufactured in Italy, shipped to Kansas, and stolen from its purchaser two years before its discovery in defendant's home. On appeal, it was claimed that the prosecution had failed to demonstrate sufficient

nexus between defendant's possession and the movement of the guns in interstate commerce. The Tenth Circuit held:

> ". . . [T]he interstate commerce provisions of Section 1202(a) are satisfied when it is shown that the firearm moved in interstate commerce prior to the time that an accused is charged with possession or receipt of the gun. It is the movement of the firearm which has the affect [sic] upon interstate commerce, and not the activity of the person in whose possession it is later found." 508 F. 2d at 1407.

In *Horton,* too, weapons were found in the defendant's home pursuant to a search warrant. The sufficiency of the evidence was challenged on appeal, and the Seventh Circuit, in rejecting the argument, succinctly laid out the requirements of the statute:

> ". . . [T]he Government showed that the defendant was a convicted felon. Another witness testified that the gun in question had been shipped from New York to Iowa in 1969. Defendant's possession of a firearm that previously moved in interstate commerce satisfies the statute." 503 F.2d at 813.

B. *United States* v. *Bass*, 404 U.S. 336 (1971) does not compel reversal of the conviction.

Bell seeks to escape the force of these authorities by relying (Br. 8) on the following passage in *United States* v. *Bass,* 404 U.S. 336, 350-351 (1971):

> "Having concluded that the commerce requirement in § 1202(a) must be read as part of the 'possesses' and 'receives' offenses, we add a final word about the nexus with interstate commerce that must be shown in individual cases. The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person 'possesses . . . in commerce or affecting commerce' if at the time of the offense the gun was moving interstate or on an interstate facility, or if

> the possession affects commerce. Significantly broader in reach, however, is the offense of 'receiv[ing] . . . in commerce or affecting commerce,' for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce." [Footnote omitted].

On the basis of this passage, and this passage alone, Bell argues that his conviction must be reversed because there is no evidence that he possessed the gun while moving interstate. That argument, we submit, reads both too much and too little into the Court's remarks in *Bass*.

Bell reads too much into the *Bass* passage by interpreting it as a definitive and unequivocal construction of the receipt and possession aspects of § 1202(a).* In fact, the Court was faced with an entirely different question: whether *any nexus at all* had to be shown between the receipt or possession of a gun and interstate commerce. Having determined that some nexus was required, the Court was not obliged to determine the quantum of proof necessary to establish the nexus. Part III of the *Bass* opinion (404 U.S. at 350-351), in which appears the passage on which Bell relies, is thus pure dictum.** Justice Brennan,

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* Bell states (Br. 8) "in its opinion the Court *focused* on the quantum of proof necessary to establish the interstate nexus in regard to offenses of possession and receipt." (Emphasis supplied). We submit that the Court did nothing of the sort.

** The Court, perhaps realizing that it was addressing a question not properly before it, set forth its conclusion in an unusually tentative and off-hand manner:

> "The Government can obviously meet its burden *in a variety of ways. We note only some of these. For example,* a person possesses in commerce or affecting commerce if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce." (Emphasis supplied). 404 U.S. at 350.

The phrasing of the passage calls into serious question Bell's implicit assumption that the Court intended an exhaustive or definitive accounting of the quantum of proof necessary to satisfy § 1202(a).

recognizing that in Part III the Court was reaching a question neither argued nor properly presented to it, specifically declined to join that portion of the opinion. 404 U.S. at 351.* See also *United States* v. *Wiley*, Dkt. No. 75-1082 (2d Cir., July 29, 1975) slip op. at 5215-5216.

Bell also reads too little into the *Bass* language because he ignores the third alternative which the Court posits as satisfying the possession requirement: "if the possession affects commerce." Bell's argument assumes that unless one possesses a weapon in the flow of interstate commerce, the statutory requirement is not met. That argument, however, encompasses only the first two of the three definitions enumerated in *Bass* and ignores the "affecting commerce" language. See *United States* v. *Oclit*, 343 F. Supp. 447, 449 (D. Hawaii 1972). Judge Bonsal explicitly found that Bell's possession of the gun affected commerce (Tr. 115). In so doing he cited the articulation of Congressional purpose set forth in 18 U.S.C. App. § 1201, that the possession of a firearm by a felon "constitutes a burden on commerce or threat affecting the free flow of commerce." There are further reasons, we submit, for concluding that Bell's possession affected commerce. The possession (and antecedent purchase) of a foreign made weapon unquestionably encourages and promotes the flow of such weapons into and through the United States. The possession of a gun sold in another state encourages individuals to travel in interstate commerce to states where guns are more accessible to everyone, including convicted felons like Bell.**

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* Part III of *Bass* thus expressed the views of only four Justices, Douglas, Marshall, White and Stewart. Chief Justice Burger and Justice Blackmun dissented from the opinion *in toto*.

** It is, of course, immaterial that Bell's possession of a weapon, by itself, had an imperceptible effect on commerce. The Supreme Court has recognized that Congress, in regulating an activity pursuant to its power under the Commerce Clause, may consider the "total incidence" of that activity on interstate commerce. *Perez* v. *United States*, 402 U.S. 146, 154 (1971); *Maryland* v. *Wirtz*, 392 U.S. 183, 192-193 (1968); *Katzenbach* v. *McClung*, 379 U.S. 294, 301 (1964).

Further evidence that Bell's reading of *Bass* is both erroneous and unduly restrictive is that virtually all of the authorities cited earlier have rejected it. These courts considered the *Bass* opinion and most particularly the passage on which Bell relies; none concluded that the interstate nexus in possession cases could only be shown by interstate movement at the time of the possession charged. All, instead, concluded that the requirement was met merely if the gun had at some point prior to possession traveled in interstate commerce.*

C. The legislative history establishes that Congress intended to ban any possession of weapons by convicted felons.

Justice Frankfurter observed that "[l]egislative words are not inert, and derive vitality from the obvious purposes at which they are aimed . . ." *Griffiths* v. *Commissioner*, 308 U.S. 355, 358 (1939). An examination of the legislative history makes clear beyond cavil that Congress intended to proscribe the mere possession of firearms by convicted felons. 18 U.S.C. App. §§ 1201-1203 originated as Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Public Law No. 90-351. Although its legislative history was described in *Bass* as "meager," 404 U.S. at 345, that which

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* Bell cites only two cases which supposedly substantiate his interpretation of *Bass*, *United States* v. *Walker*, 489 F.2d 1353 (7th Cir. 1973), *cert. denied*, 415 U.S. 982 (1974) and *United States* v. *Fikes*, 373 F. Supp. 1052 (E.D. Mich. 1974). *Walker* must be read in light of *United States* v. *Horton*, *supra*, a subsequent Seventh Circuit decision that explicitly holds that possession of a firearm that previously moved in interstate commerce is sufficient under the statute. *Fikes*, to the extent it conflicts with the numerous Sixth Circuit cases cited earlier, *United States* v. *Fields*, *supra*; *United States* v. *Bush*, *supra*; *United States* v. *Day*, *supra*; and *United States* v. *Brown*, *supra*, must be deemed wrongly decided.

exists points clearly to a single conclusion, namely, that Congress intended to ban possession in any form.*

Senator Long of Louisiana, the sponsor of Title VII, described its purpose as follows:

> "I have prepared an amendment which I will offer at an appropriate time simply setting forth the fact that anybody who has been convicted of a felony . . . is not permitted to possess a firearm.
>
> . . . When a man has been convicted of a felony . . . that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them." 114 Cong. Rec. 13868.

Senator Long proceeded to make clear that the act of possession was not to be proscribed simply when it took place in the flow of interstate commerce. In an exchange with Senator McClellan, he emphasized that even possession of weapons in one's home was forbidden:

> "Mr. Long of Louisiana. This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.
>
> Mr. McClellan. Could he have it in his home?
>
> Mr. Long of Louisiana. No, he could not.
>
> Mr. McClellan. Can we under the Constitution, deny a man the right to keep a gun in his home?
>
> Mr. Long of Louisiana. When a man is a convicted felon, he can be denied many of the rights that he otherwise would be entitled to possess." 114 Cong. Rec. 14774.

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* Discussion of Title VII during Senate debates can be found at 114 Cong. Rec. 13868-13871, 14772-14775, and during House debates at 114 Cong. Rec. 16286, 16298. Much of this is reprinted in the appendix to *Stevens* v. *United States*, 440 F.2d 144 (6th Cir. 1971) at 152-166.

Senator Long's understanding of the reach of Title VII accorded with the interpretation advanced by its proponents in the House of Representatives. As Representative Pollock stated:

> "The overall thrust [of Title VII] is to prohibit possession of firearms by criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner." 114 Cong. Rec. 16298.

The import of Senator Long's remarks suggested here was clear even to the Supreme Court in *Bass*. As the Court noted, "specific remarks of the Senator can be read to state that the amendment [Title VII] reaches the mere possession of guns without any showing of an interstate commerce nexus," 404 U.S. at 345. The Court nevertheless construed § 1202 as enacted to require *some* nexus with interstate commerce.* The construction of § 1202 which Bell proposes does not merely require some minimal connection between possession and commerce; it requires that the possession of the weapon and its passage in interstate commerce be simultaneous. If anything is clear from the debates, it is that Congress intended to prevent specified classes of people, including felons, from possessing weapons at any time. It did not merely intend to proscribe

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* The Court reached this result because it found the legislative history ultimately ambiguous and therefore concluded that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 404 U.S. at 347. Although, given the language of the statute, doubt was entertained by the Court that Congress intended that there be *no* interstate nexus with respect to receipt or possession of a firearm, the issue presented in *Bass*, we submit that there can be no doubt that Congress intended in Title VII to reach possession in all its manifestations to the fullest extent permitted by its power to legislate concerning interstate commerce.

possession only while such individuals were carrying weapons across state lines or on interstate facilities, thereby permitting possession to be resumed within state boundaries.*

D. The logic of the statutory language compels the conclusion that simple possession violates the statute.

Finally, the Government submits that any rational construction of the statute yields the interpretation of possession we have suggested. A useful point of departure is the principle of statutory construction cited at p. 10 of Bell's brief, namely, that a statute should be construed so as to give effect to all its provisions, and so that no element will be rendered superfluous. Sutherland, *Statutes and Statutory Construction* (4 Ed., 1973) § 46.06; *United States* v. *Dinerstein,* 362 F.2d 852, 855 (2d Cir. 1966). If, as Bell argues, possession of a weapon in the stream of interstate commerce is the only "possession" that violates the statute, that offense would be legally and factually indistinguishable from the offense of transporting a weapon. Under Bell's construction, whenever an individual possessed a weapon in interstate commerce, he would also be transporting it and vice-versa. This reading violates the very principle of statutory construction which he has invoked.

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* ". . . [I]t seems unreasonable to concluded that once Congress determined that possession alone was to be illegal it would hamper prosecution for the new offense with the requirement that the Government show a contemporaneous interstate commerce movement, which requirement might frequently amount to proof regarding the manner of acquisition of the firearm. [Appellant's] position that the Government must prove that the felon possessed the gun *while it was in* interstate commerce would create the very problems of proof that it would seem Congress meant to avoid by making possession itself illegal." (Italics in original) *United States* v. *Snell,* 353 F. Supp. 280, 283 (D. Md. 1973).

Bell apparently concedes (Br. 13), as he must under the passage in *Bass* he relies on, that the "receipt" portion of the statute is violated if a weapon is received at any point after it has traveled in interstate commerce. The Government submits that both logic and the text of the statute require that the possession portion be similarly interpreted. Bell's argument requires that the phrase "in commerce or affecting commerce" mean one thing when it modifies the operative verb "receives" and quite another when it modifies the verb "possesses". There is nothing in the wording of the statute that suggests such differences, and it was precisely an argument of this sort which the Supreme Court rejected in *Bass* when it declined to adopt the Government's construction that the commerce requirement in the statute applied to transportation but not to receipt or possession. 404 U.S. at 340-341. Bell's reading of the "possession" requirement is no more compelled by the language of the statute than a reading of "receipt" which would be limited to the receipt of a weapon while it was moving in interstate commerce. If the text permits a broader reading for receipt, there can be no reason why a comparably broad interpretation of "possession" is not warranted as well.

The interpretation of "possession" which Bell urges upon this Court would lead to obvious anomalies in the interpretation and, consequently, the enforcement of the statute. Under Bell's reading, a defendant would be violating the statute by receiving a weapon that had traveled in interstate commerce but not by retaining custody of it. Hence, unless the time and place of receipt could be pinpointed, a convicted felon found in possession of a gun would be beyond the reach of prosecution. In some few cases, as where a defendant had purchased the weapon from a registered firearms dealer and the sale is consequently recorded, the point of receipt can be specified. In the vast majority of cases, where a weapon is stolen or finds its way to the defendant's possession through some channel other than

a licensed dealer,* it will be virtually impossible to specify the point of receipt. Bell's interpretation, moreover, would result in innumerable hair-splitting arguments over when "possession" of a gun commenced and when "receipt" terminated, the latter being violative of the statute and the former, as Bell argues, beyond its reach. We submit that it is plain from the debates that Congress intended to fill in significant gaps in the scope of gun control legislation through the passage of Title VII. Bell's interpretation shrinks the ambit of the statute to a point where it covers few, if any of the preexisting gaps. As one court has noted,

> ". . . [t]he history of the gun control laws, the parallel experience with the drug laws, and the concern expressed by Congress with the accessibility of guns to convicted felons, see 18 U.S.C. App. § 1201, all point to the conclusion that the narrower reading of Section 1202(a) would not preserve the core of the Congressional purpose." *United States* v. *Snell*, 353 F. Supp. 280, 283 (D. Md. 1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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* See, e.g., *United States* v. *Brown*, *supra*; *United States* v. *Horton*, *supra*; *United States* v. *Bumphus*, *supra*; *United States* v. *Williams*, *supra*.

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Jeremy G. Epstein being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of August, 1975 he served two copies ~~a copy~~ of the within brief by placing the same in a properly postpaid franked envelope addressed:

Frederick P. Hafetz, Esq
Goldman & Hafetz
60 East 42nd Street
New York, N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing Annex inside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this
8th day of August 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977